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Nagadevan a/l Mahalingam v Millenium Medicare Services

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-03(IM)-95 OF 2009
SULAIMAN DAUD, AZHAR AND MOHAMED APANDI ALI JJCA
15 OCTOBER 2010

Civil Procedure — Striking out — Application to strike out action — Dismissed — Appeal against — Whether action against appellant should be struck out — Whether High Court judge erred in law and in fact in dismissing appellant's striking out application — Rules of the High Court 1980 O 18 r 19

Contract — Agreement — Partnership agreement — Construction of partnership agreement — Clause restraining appellant from practising as medical practitioner within radius of 15km of any partnership clinic — Whether clause was covenant in restraint of trade and therefore void and unenforceable against appellant — Exceptions — Whether parties agreed to restraint in anticipation of dissolution of partnership — Contract Act 1950 s 28 & 28(2)

Partnership — Agreement — Restrictive covenant — Clause restraining appellant from practising as medical practitioner within radius of 15km of any partnership clinic — Whether clause was covenant in restraint of trade and therefore void and unenforceable against appellant — Exceptions — Whether parties agreed to restraint in anticipation of dissolution of partnership — Contract Act 1950 s 28 & 28(2)

Pursuant to a partnership agreement ('the agreement') between Nagadevan a/l Mahalingam ('the appellant'), a registered medical practitioner, and Millenium Medicare Services ('the respondent'), a partnership of medical practitioners, the appellant became a partner of the respondent firm. Clause 11(3) of the agreement, which was in the nature of a restrictive covenant, restrained the appellant from practising as a medical practitioner within a radius of 15km of any partnership clinic. In February 2007 the appellant exercised his right to resign from the partnership by serving a three-month notice ('the notice') on the managing partner of the respondent firm. However, before the expiry of the notice, the appellant left the respondent and practised as a medical practitioner at Klinik Medic Care, which was situated within a 15km radius from one of the respondent's clinic. On 2 October 2007, the respondent commenced legal action against the appellant for breach of the said restrictive covenant. Subsequently on 21 November 2007, the appellant applied to strike out the writ and statement of claim but the application was dismissed by the SAR. The

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appellant appealed to a judge in chambers, who affirmed the decision of the SAR. This was the appellant's appeal against the decision of the High Court judge. In his appeal, the appellant submitted that cl 11 (3) of the agreement was a restraint covenant and therefore void and unenforceable against him under s 28 of the Contract Act 1950 ('the Act'). He further submitted that as the covenant to be enforced was void, the respondent's claim herein was obviously unsustainable and ought to be struck out under any limb of O 18 r 19 of the Rules of the High Court 1980 In response the respondent argued that even if cl 11(3) was a covenant in restraint of trade the exception in s 28(2) of the Act was applicable, as the parties had agreed to the restraint in anticipation of the dissolution of the partnership. As such, the respondent contended that the issue as to the application of s 28(2) of the Act was a matter for decision at a trial and that the appellant's striking out application ought to be dismissed.

Held, allowing the appeal with costs:

(1) Section 28 of the Act clearly provides that a contract in restraint of trade is void unless it falls under any of the exceptions thereto. In the instant case it was apparent that the covenant in cl 11 of the agreement, which had the effect of restricting the liberty of the appellant to carry on the practice of a medical practitioner, by himself or with others, for such period and within such limit as specified therein, was an agreement in restraint of trade within the meaning of s 28 of the Act (see paras 11 & 12).

(2) According to the wording of s 28(2) of the Act this exception only applied to an agreement made between the partners when the same was made upon or in anticipation of the dissolution of the partnership. In the present case the appellant was not a partner of the respondent firm at the time of the execution of the agreement, and was only admitted as a partner pursuant to the agreement. Since the appellant was not even a partner of the respondent firm when he entered into the agreement it could not be said that the said agreement was made in anticipation of the dissolution thereof. Further it was not pleaded in the statement of claim that the restrictive covenant sought to be enforced herein was made with such an objective. As such, cl 11 was a covenant in restraint of trade, which was void under s 28 of the Act (see paras 13 & 14).

[Bahasa Malaysia summary

Berikutan satu perjanjian perkongsian ('perjanjian tersebut') antara Nagadevan a/l Mahalingam ('perayu'), pengamal perubatan berdaftar dan Millenium Medicare Services ('responden'), sebuah perkongsian pengamal-pengamal perubatan, perayu menjadi rakan kongsi kepada firma responden. Klausa 11(3) perjanjian, yang mana bersifat waad penyekat, menghalang perayu daripada beramal sebagai pengamal perubatan dalam radius 15km daripada klinik perkongsian. Pada Februari 2007, perayu menjalankan haknya untuk

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meletakkan jawatan daripada perkongsian dengan menyampaikan notis tiga bulan ('notis tersebut') kepada pekongsi pengurusan firma responden. Walau bagaimanapun, sebelum tarikh tamat notis tersebut, perayu telah meninggalkan responden dan beramal sebagai pengamal perubatan di Klinik Medic Care yang terletak dalam radius 15km salah satu klinik responden. Pada 2 Oktober 2007, responden memulakan tindakan undang-undang terhadap perayu bagi pelanggaran waad penyekat tersebut. Seterusnya, pada 21 November 2007, perayu memohon untuk membatalkan writ dan penyataan tuntutan tetapi permohonan ditolak oleh PKP. Perayu merayu kepada hakim dalam kamar, yang mengesahkan keputusan PKP. Ini adalah rayuan perayu terhadap keputusan hakim Mahkamah Tinggi. Dalam rayuannya, perayu menghujahkan bahawa klausa 11(3) perjanjian tersebut adalah waad penyekat dan dengan itu terbatal dan tidak boleh dikuatkuasakan ke atasnya di bawah s 28 Akta Kontrak 1950 ('Akta'). Dia menghujahkan lagi bahawa memandangkan waad yang hendak dikuatkuasakan adalah terbatal, tuntutan responden jelas tidak boleh disokong dan sepatutnya dibatalkan di bawah mana-mana bahagian A 18 k 19 Kaedah-kaedah Mahkamah Tinggi 1980. Sebagai balasan, responden menghujahkan bahawa walaupun klausa 11(3) adalah waad yang menyekat perdagangan, pengecualian s 28(2) terpakai, oleh kerana pihak-pihak telah bersetuju untuk mencegah daripada jangkaan pembubaran perkongsian. Oleh itu, responden menghujahkan bahawa isu permohonan s 28(2) Akta adalah perkara yang harus diputuskan dalam bicara dan bahawa pembatalan permohonan oleh perayu hendaklah ditolak.

Diputuskan, membenarkan rayuan dengan kos:

(1) Seksyen 28 Akta dengan jelas memperuntukkan bahawa kontrak dalam mencegah perdagangan adalah tidak sah melainkan jika ia jatuh di bawah mana-mana pengecualian dengannya. Dalam kes ini, adalah jelas bahawa waad dalam klausa 11 perjanjian tersebut, yang mempunyai kesan menyekat kebebasan perayu untuk meneruskan amalan sebagai pengamal perubatan, untuk dirinya atau bersama yang lain-lain, bagi tempoh dan dalam had yang ditetapkan di dalamnya, adalah satu perjanjian yang mencegah perdagangan dalam maksud s 28 Akta (lihat perenggan 11 & 12).

(2) Menurut perkataan s 28(2) Akta, pengecualian ini hanya terpakai kepada perjanjian yang dibuat antara pekongsi-pekongsi apabila yang sama dibuat atau jangkaan pembubaran perkongsian. Dalam kes ini, perayu bukan rakan kongsi dalam firma responden pada masa pelaksanaan perjanjian, dan hanya diterima sebagai rakan kongsi berikutan perjanjian. Oleh kerana perayu bukan rakan kongsi kepada firma responden apabila dia memasuki perjanjian, tidak boleh dikatakan bahawa perjanjian tersebut dibuat jangkaan pembubarannya. Seterusnya, tidak diplidkan dalam penyataan tuntutan bahawa waad penyekat mesti dikuatkuasakan daripada ini dibuat dengan objektif

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tersebut. Dengan itu, klausa 11 adalah waad penyekat perdagangan, yang tidak sah di bawah s 28 Akta (lihat perenggan 13 & 14).]

Notes

For a case on construction of partnership agreement, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 4683.

For cases on application to strike out action, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7482–7494.

For cases on partnership in general, see 10 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 959–1162.

Cases referred to

Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

General Steel Industries Inc v Commissioner of Railways (NSW) (1964) 112 CLR (refd)

Petrofina (Gt Britain) Ltd v Martin & Anor [1966] 1 All ER 126 (refd)

Polygram Records Sdn Bhd v The Search & Ors [1994] 3 MLJ 127; [1994] 3 AMR 40, HC (refd)

United Manufacturer Sdn Bhd v Pogon Tokou Sdn Bhd & Anor [1986] 1 MLJ 70 (refd)

Wrigglesworth v Wilson Anthony [1964] MLJ 269 (refd)

Legislation referred to

Contract Act 1950 s 28, Exception 2

Rules of the High Court 1980 O 18 r 19, O 18 r 19(1)(a), (b), (c)

Appeal from: Civil Suit No 22–584 of 2007(1) (High Court, Johor Bahru)

Mohd Faizal Ahmad (Hazelin & Associates) for the appellant.
KS Pang (KS Pang & Co) for the respondent.

Sulaiman Daud JCA (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of learned judge of the High Court dismissing his appeal from the order of the deputy registrar in refusing to strike out the respondent's writ of summons and statement of claim under O 18 r 19(1)(a), (b) and (c) of the Rules of the High Court 1980 ('RHC'). The appeal relates to the enforceability of a restrictive covenant contained in a partnership agreement entered between medical practitioners. After hearing submissions of counsel from both parties, we allowed the appeal with costs. We now give our reasons for the decision.

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[2] The relevant facts are not disputed and are as follows. The appellant ('defendant in the court below') is a registered medical practitioner in practice in the State of Johore. The respondent ('plaintiff in the court below') is a partnership of medical practitioners engaged in the practice of medicine in that state. By a partnership agreement dated 1 November 2006 entered between the appellant and the old partners of the firm ('the agreement'), the appellant was admitted as a working partner of the firm. Clause 2(i) of the agreement provided that the partnership commenced from the date of the agreement and should continue for a term of two years from that date, after which the partnership should continue on yearly basis. Clause 2(ii) conferred on the appellant the right to terminate the partnership by giving a three-months notice in advance to the managing partner.

[3] The agreement also contained a restrictive covenant, in cl 11(iii), in the following terms:

> 11. No partner shall without the written consent of the Managing Partner:
>
> (i) ...
>
> (ii) ...
>
> (iii) set up any medical practice within three (3) years after ceasing to be a partner within a radius of 15 KM from any partnership clinic as medical practitioner either by himself or as a partner or employee of any person or company.

[4] In February 2007 the appellant decided to resign as a working partner of the firm and served a three months notice to the managing partner of the firm in a letter dated 5 February 2007. The relevant part thereof reads as follows:

> Dear Sirs,
>
> Re: Resigning as working partner
>
> I would like to inform that I am resigning as a working partner of Millennium Medicare Services effective 5th May 2007.
>
> Thank you for the opportunity provided during my employment here.

[5] However, before the expiry of the three months, the appellant left the respondent and practiced as a medical practitioner at Klinik Medic Care which was situated within the 15km radius from one of the respondent's clinic. In August 2007, the appellant commenced the present action to enforce the said restrictive covenant. On 2 October 2007 the respondent obtained an interlocutory injunction restraining the appellant from practicing within the said 15km radius. Subsequently on 21 November 2007 the appellant applied to strike out the present writ and statement of claim. The decision of the SAR in dismissing the application was affirmed by the judge in chambers on appeal, and hence the present appeal.

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[6] Mr Mohd Faizal, for the appellant, contended that cl 11(iii) of the agreement was a restraint covenant, and therefore void and unenforceable against the appellant under s 28 of the Contract Act 1950 ('the Act'). In support, learned counsel referred to *Wrigglesworth v Wilson Anthony* [1964] MLJ 269 where it was held that except in respect of the three exceptions as provided in s 28 of the Act, every agreement by which anyone is restrained from exercising a lawful profession is to that extent void. We also referred to the case of *Polygram Records Sdn Bhd v The Search & Ors* [1994] 3 MLJ 127, [1994] 3 AMR 40, (HC) where it was also held that 'any clause which seeks to prohibits the defendants from making any recordings after the expiry of the contract becomes an unlawful restrain of trade and is void under s 28'. In conclusion, learned counsel submitted that as the covenant to be enforced in the present suit was void, the respondent's claim herein was obviously unsustainable and ought be struck out under any limb of O 18 r 19 of the RHC.

[7] Mr KS Pang, for the respondent, argued that even if the said clause was a covenant in restraint of trade exception 2 to s 28 of the Act is applicable as the parties have agreed to the restraint in anticipation of the dissolution of the partnership. He further submitted that the issue as to whether such a covenant was made in anticipation of such a dissolution was a matter for decision at a trial upon the examination of witnesses. According to learned counsel the decision in *Wriggleworth*'s is clearly distinguishable as it concerned a covenant between an employer and employee and not a covenant between partners as in the present appeal.

[8] The question is whether, based on the pleadings and the affidavits of the parties, the learned judge had erred in law and in fact in affirming the decision of the SAR dismissing the appellant's striking out application. The principles applicable to such an application have been stated in numerous cases which adhered to the basic rule that it is only in plain and obvious cases that recourse should be had to the summary process. To justify the striking out a statement of claim, the defendant must satisfy the court that the plaintiff has no reasonable cause of action, or that the claim is on the face of it 'obviously unsustainable', (see *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, (SC)). In an Australian case of *General Steel Industries Inc v Commissioner of Railways (NSW)* (1964) 112 CLR, Barwick CJ applied the test as to 'whether the plaintiff's case is so clearly untenable that it cannot possibly succeed'. On the part of the plaintiff he only need to show that his claims raise a real question to be determined whether of fact or of law which can only be explored in a proper trial (see *United Manufacturer Sdn Bhd v Pogon Tokou Sdn Bhd & Anor* [1986] 1 MLJ 70.

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[9] In our view this appeal can be decided by determining the following two issues, namely: (a) whether the said cl 11(iii) is a covenant in restraint of trade under s 28 of the Act; and (ii) if so, whether it falls within the ambit of exception 2 to that section.

[10] The law relating to 'an agreement in restraint of trade' is provided in s 28 of the Act which reads as follows:

> *Agreement in restraint of trade void*
>
> 28 Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.
>
> *Saving of agreement not to carry on business of which good will is sold*
>
> Exception 1 - (not relevant)
>
> *of agreement between partners prior to dissolution*
>
> Exception 2 - Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on business similar to that partnership, within such local limits as are referred to in exception 1.
>
> *or during continuance of partnership*
>
> Exception 3 - (not relevant).

[11] The said s 28 clearly provides that a contract in restraint of trade is void unless it falls under any of the exceptions thereto. It is apparent to us that the said provision is a statutory codification of the common law principle on this subject. However, we shared the view expressed by Visu Sinnadurai J in *Polygram Records Sdn Bhd*, that the validity of such covenant is not subject to the 'reasonableness test' under the common law. On this issue we also find support in the opinion expressed by Hashim J in *Wriggleworth*'s *case*, to the effect that the English cases were not applicable in the interpretation of the said section. Further, in our view, the inclusion of the three common law exceptions to the general rule on the covenant in restraint of trade as provided in that section is a clear manifestation of the intention of the legislature to make the said provisions exhaustive.

[12] We will proceed with the first issue. In *Petrofina (Gt Britain) Limited v Martin And Another* [1966] 1 All ER 126, Lord Diplock said, at p 138: 'A contract in restraint of trade is one which a party (the covenantor) agrees with any other party (the covenantee) to restrict the liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses …' In the instant case it is apparent to us that the covenant in said cl

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11(iii) has the effect of restricting the liberty of the appellant to carry on the practice of medical practitioner in future either by himself or with other persons for such period and within such limit as specified therein. We therefore conclude that it is an agreement in restraint of trade within the meaning of s 28 of the Act.

[13] There remains the question as to whether such an agreement was made in anticipation of the dissolution of the partnership so as to fall within the ambit of the said exception 2. In our view it was not so made. It is apparent from the wordings thereof that the said exception only apply to an agreement made between partners, and that the same was made upon or in anticipation of the dissolution of the partnership. In the present case it is without doubt that the appellant was not even a partner of the firm at the time of the execution of the agreement. It is evident from cl 1 thereof, that he was only admitted as a partner of the firm pursuant to the agreement. Since the appellant was not even a partner of the firm then, it cannot be said that the said agreement was made in anticipation of the dissolution thereof. Further, it was not even pleaded in the statement of claim that the restrictive covenant sought to be enforced herein was made with such an objective.

[14] For the reasons aforesaid, we hold that the clause sought to be enforced herein was a covenant in restraint of trade, and therefore void under s 28 of the Act. We are satisfied that the respondent's case (to borrow the words of Barwick CJ above) is so clearly untenable that it cannot possibly succeed. Accordingly, we allowed the appeal with costs of RM10,000, being the costs of this appeal and that of the court below. We also ordered the deposit for this appeal to be refunded to the appellant.

Appeal allowed with costs.

Reported by Kohila Nesan